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No. 339

In the Supreme Court of the United States

OCTOBER TERM, 1946

F. C. MOSER, *Petitioner*,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the

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F. C. MOSER,
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vs.

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No. 339

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Neither of the opinions below has as yet appeared in the printed reports. The opinion of the District Court dismissing the Amended Third Cause of Action, here sought to be reviewed, is set forth in the Appendix, *infra*, pp. 9-15. The Circuit Court of Appeals accepted the opinion of the District Court and, for the reasons therein set forth, affirmed its judgment (R. 1198).

JURISDICTION

This cause was begun in the Superior Court of the State of Washington for King County (R. 2) and re-

moved to the United States District Court for the Western District of Washington, Northern Division, solely by reason of diversity of citizenship (R. 14-19), The judgment of the Circuit Court of Appeals affirming the judgment of dismissal was filed March 11, 1946 (R. 1199). A timely petition for rehearing was denied June 21, 1946 (R. 1200). Petition for a writ of certiorari was filed July 30, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the allegations of the First Amended Complaint pertaining to the Third Cause of Action therein set forth, as supplemented by the Bill of Particulars, seeking reformation of a written contract by striking therefrom a provision that either party might terminate the same without cause upon thirty days written notice and seeking recovery of $485,864.42 as damages for breach of the contract as thus modified, which according to Petitioner thereby became one for life-time employment, stated facts upon which relief could be granted.

STATEMENT

Petitioner had been for many years an insurance agent in the employ of Respondent life insurance company. On or about March 7, 1942, he instituted an action against the company in the state courts of the State of Washington, setting forth four causes of action (R. 11). This proceeding was duly removed to

the appropriate District Court of the United States upon the sole ground of diversity of citizenship (R. 19). Petitioner now acquiesces in the disposition by the lower courts of all causes of action except the third (Pet. 1).

In the record at the pages hereinafter indicated the opinions and decisions of the lower courts in respect of the first, second and fourth causes of action respectively, if of interest here, are set forth, namely: First cause of action—R. 1114-1122, 1144, 1165-1172, 1182-1183; Second cause of action—R. 1122, 1144, 1167, 1183; Fourth cause of action—R. 1126-1129, 1130-1131, 1137-1138, 1144-1145, 1172-1175, 1183-1185.

As to the Third Cause of Action Petitioner seeks the instant review upon certiorari.

This Third Cause of Action is set forth in the First Amended Complaint (R. 26) which was filed in the District Court on April 28, 1942 (R. 40).

In respect to the Third Cause of Action, Respondent served and filed two motions. One was for a more definite statement or for a bill of particulars (R. 114). The other was for dismissal upon the ground that plaintiff therein failed to state a claim upon which relief could be granted (R. 113).

In voluntary compliance with the first of these motions, Petitioner served and on November 3, 1942, filed a Bill of Particulars (R. 119).

Upon due consideration of the First Amended Complaint, the Bill of Particulars, the voluminous briefs

submitted, and after hearing prolonged oral arguments, the District Court on March 12, 1943, filed a written opinion granting the motion to dismiss (R. 147) and shortly thereafter a formal order to this effect was duly entered (R. 145).

This opinion of the District Court was adopted by the Circuit Court of Appeals upon the subsequent appeal as the opinion of that court in affirming the judgment of dismissal (R. 1198). It is printed in the Appendix, *infra*, pp. 9-15.

The question decided by the lower courts on this point was a question of law upon the pleadings involving solely the construction of written instruments. The gist of plaintiff's complaint on this score was that under the terms of written contracts which he pleaded, he became entitled to life-time employment by the defendant below and that the invariably recurrent provisions of the successive agency contracts which he pleaded, providing for termination of the employment by either party without cause upon thirty days' written notice were superseded and modified by the so-called "Senior Nylic" benefits to which he became entitled on January 1, 1928 (R. 36). These rights he claimed by reason of acceptance in writing by defendant on September 16, 1910 (R. 29) of an application made by plaintiff on August 17, 1910, to become a member of "Nylic" as outlined in Exhibit F attached to his complaint (R. 91). Petitioner sought reformation of the applicable written agency agreement (Exhibit D, R. 50) and damages for an alleged breach thereof, resulting from termination of the agreement

by Respondent on August 22, 1936, pursuant to the specific provisions therein contained.

The cause of action here under consideration incorporated by reference (R. 35) the plaintiff's First and Second Causes of Action set forth in the same amended complaint. Attached to the said complaint also, and incorporated by reference, were six written contracts (R. 27). In addition, the Bill of Particulars with reference to the Third Cause of Action covered eight pages of record (R. 121-129). The pleadings and written instruments required to be considered by the Courts in considering the motion to dismiss cover over one hundred pages of record (R. 26-129).

ARGUMENT

The courts below correctly decided the question of the construction of the contracts between the Respondent insurance company and Petitioner, its agent to solicit insurance, with reference to the extent and duration of Petitioner's rights thereunder. In view of the lengthy character of the documents requiring consideration in the determination of those questions, we have attached hereto in the Appendix, *infra*, pp. 17-88, a detailed analysis of the documents and a brief on the merits in support of the decision of the lower courts. Reference thereto will demonstrate how preposterous and totally unsupported in the Record are many of the assertions in Petitioner's brief. In the Appendix also, is printed the decision of the District Court which was adopted by the Circuit Court of

Appeals (*infra*, p. 9) and upon which we might well rest as far as the merits are concerned.

It seems manifest to us, however, and we respectfully urge that the instant petition discloses no proper occasion for the issuance of the writ sought. The case is an ordinary one for alleged breach of a contract of employment which is in the Federal Courts solely by reason of diversity of citizenship. No constitutional question is raised, no Federal statute is involved, no conflict in the Circuits is asserted. No matter of public concern is involved unless Petitioner's argument is sound that the mere fact that the Respondent is a mutual insurance company makes it such or because he guesses that many of Respondent's agents have similar contracts. There are no apposite local decisions which have not been properly regarded. Indeed, Petitioner asserts there are no precedents for the Third Cause of Action (Br. 29).

On the last-mentioned point Petitioner does cite (Br. 20) two Washington cases on the proposition that when a party binds himself to do an act in a contract, which can only be done by co-operation with the other party, an obligation on the part of the latter to co-operate is implied. Such cases, however, announce no peculiar local rule and were fully considered by the Courts below. To seek to make them applicable Petitioner contends that as a "Senior Nylic" he engaged to devote all of his time, talents and energies to the Company's service in soliciting personally for business throughout his life (Br. 11). This is the cornerstone of Petitioner's argument. Yet the provisions of the

contract which he pleaded expressly excepted "Senior Nylics" from the requirement of exclusive service (R. 109). The Courts below so found and further decided, in accordance with the written agreement, that Petitioner had an express option to terminate his employment at any time on thirty days' notice.

We submit that there is nothing in the nature of this litigation which should induce this Court to exercise its sparingly-used power to issue the writ of certiorari to the Circuit Court of Appeals. *Forsyth v. Hammond*, 166 U.S. 506, 41 L. ed. 1095; *Hamilton Brown Shoe Co. v. Wolf Bros. &Co.*, 240 U.S. 251, 258, 60 L. ed. 629; Rule 38(5) Revised Rules of the Supreme Court of the United States.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

APPENDIX I

OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

F. C. MOSER, *Plaintiff,*

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation, *Defendant.*

No. 503

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This matter is before the court upon defendant's motion to dismiss the third cause of action of plaintiff's amended complaint for failure to state a claim upon which relief can be granted.

It seems to me after a careful consideration of the allegations of such cause of action, of the representations claimed, of the terms of the several contracts between the parties made a part of the same, of the plaintiff's bill of particulars, and of the host of authorities cited by both sides, as well as of authorities found on independent search, that the motion is well founded.

Counsel will understand that the following is in-

tended to let them and the parties hereto know how certain phases of the matter appear to me rather than as a complete or formal memorandum opinion.

Exhibit "D," the contract dated December 31, 1927, by its terms effective beginning January 1, 1928, and in effect when defendant terminated plaintiff's agency, contains the following provision:

> "Either party hereto may without cause terminate this agreement upon thirty days' written notice." (From Section 20 of Exhibit "D").

But even if the parties had not executed Exhibit "D" I still do not believe that the third cause of action would be good against such motion. In each agency contract between the parties prior to Exhibit "D" we find substantially the same provision. For instance, Exhibit "C", which was the contract dated August 17, 1910, by its terms effective beginning January 1, 1911 and in force until January 1, 1928, when it was superseded by Exhibit "D", states:

> "18th. It is agreed that either party hereto may without cause terminate this agreement upon thirty days' written notice."

True, plaintiff alleges that he completely gave up other employment, became a full-time soliciting agent for defendant, and applied for Nylic membership under representations that after he should become a Senior Nylic he would be entitled to a life agency in addition to the Nylic payments specified by Nylic 2 (Exhibit "F") for a Senior Nylic. Now, the terms of the several agency contracts not only do not con-

tain any such provisions but in each instance completely negative the same.

Since each agency agreement specifically states that either party may without cause, on thirty days' written notice, terminate the agency relation certainly very clear and unambiguous language would be required in the provisions of Nylic 2, even under the allegations of plaintiff, to nullify such agency agreement provisions for termination. There is no express language whatever in Nylic 2 (Exhibit "F") providing for any life agency for Senior Nylics nor providing that the termination without cause of the agency relations shall not apply to agents after they become Senior Nylics. It can, therefore, only be by implication that the express provisions of each agency contract can be nullified as contended by plaintiff.

Unquestionably, a Senior Nylic can receive, and unquestionably plaintiff as a Senior Nylic has for several years been receiving, the Senior Nylic benefit payments without continuing to be an agent after becoming a Senior Nylic. Nylic 2 contemplates that many Senior Nylics will cease to be agents some time after becoming Senior Nylics and further contemplates that nevertheless the Senior Nylic payments will still be paid. Thus, a Senior Nylic does not have to be an agent for life to receive Nylic payments for life.

Plaintiff, in effect, argues that the third cause of action shows he was promised permanent employment; that permanent employment necessarily means

only life employment; and that moreover, it is against public policy for any Senior Nylic not to have life employment as an agent in addition to receiving the Nylic payments for life.

I do not find in Nylic 2 any requirement that any Nylic member or any Senior Nylic should have permanent employment as an agent. At most there are only expressions of the desirability of permanency of agency, which expressions apply just as much to such desirability from the standpoint of the company as from that of the agent, and apply just as much to the period before as to the period after an agent should become a Senior Nylic.

Plaintiff concedes that during the twenty-year period before he became a Senior Nylic that his agency was terminable by either party without cause upon thirty days' written notice and hence in effect concedes that it would not have been against public policy for the defendant to have cancelled plaintiff's agency without cause after even nineteen years' service although such cancellation would have ended his Nylic membership and his chance to have ever become a Senior Nylic. And such substantially is the holding of *Bone v. New York Life Ins. Co.* (Minn. 1925) 206 N.W. 452. If termination just short of the time required for qualifying as a Senior Nylic is not against public policy then it seems a similar termination thereafter with far less injurious result to the agent would not be.

Moreover, "permanent employment" is not neces-

sarily synonymous with "lifetime employment." According to the dictionaries and numerous legal decisions the term "permanent" as applied to employment means that it is contrasted with temporary employment. In fact, in plaintiff's brief we find that "permanent employment" is the antonym of "temporary employment." Therefore, it appears that any employment which is sufficiently long as clearly not to be temporary would be permanent. In such connection see *McKelvy v. Choctaw Cotton Oil Co.*, 152 P. 414; *Combs v. Standard Oil Co. of Louisiana*, 59 S.W. (2d) 525; *Faulkner v. Des Moines Drug Co.*, 90 N.W. 585, 586; *New England Mutual Life Ins. Co. of Boston, Mass., v. Hurst*, 199 A. 822, 826.

Let it be assumed, however, that under the terms of Nylic and the promises and representations alleged to have been made to plaintiff that plaintiff prior to December 31, 1927, was entitled on January 1, 1928, by becoming a Senior Nylic on that day, to a life agency in spite of the clause of the agency contract then in force (Exhibit "C" made in 1910) providing for termination without cause on notice. Plaintiff certainly could have exchanged any such right to a life agency for a terminable agency after he became a Senior Nylic, which terminable agency would entitle him to a greater compensation.

Exhibit "D" provided for a higher schedule of compensation to plaintiff as a soliciting agent effective the same day plaintiff was to become a Senior Nylic and specified in unmistakeable words:

"Either party hereto may without cause ter-

minate this agreement upon thirty days' written notice."

If Exhibit "D" and Nylic 2 be deemed but parts of one contract, as plaintiff contends they should be, we still find two specifications—first, that the period of plaintiff's agency is subject to section 20 of Exhibit "D" and may be terminated as therein provided; and second, that Exhibit "D" shall not affect plaintiff's Senior Nylic membership. In other words, the parties agreed that the agency might be terminated by either party without cause but that the Senior Nylic membership should nevertheless continue.

To me the conclusion is unescapable that whether previously plaintiff did or did not have the right to a lifetime agency as a Senior Nylic in any event he surrendered any such right by entering into Exhibit "D" with its higher schedule of compensation.

It cannot be overlooked that Exhibit "D" was made in contemplation of plaintiff's being a Senior Nylic for it expressly specified that plaintiff could only be a Senior Nylic during its effective life. Exhibit "D" nevertheless provided for agency termination without cause.

True, plaintiff now asks the court to reform Exhibit "D" so as to eliminate the provision he does not like while retaining the terms that are favorable to him. That is, plaintiff prays this court to now write as of about fifteen years ago the contract that

plaintiff today wishes he had insisted on in 1927. The third cause of action moved against does not contain the allegations necessary for any such relief. Whether or not the defendant has been as ungrateful towards plaintiff as the third cause of action alleges is not for this court to determine. Plaintiff and defendant, each in Exhibit "D", unmistakably agreed that either with respect to the agency might "without cause" upon thirty days' written notice be ungrateful to the other.

The motion to dismiss the third cause of action must be granted. Formal order after notice is requested.

Dated March 12, 1943.

LLOYD L. BLACK,
United States District Judge.

APPENDIX II

THE MERITS OF PETITIONER'S CLAIM

STATEMENT OF THE CASE

In the language of the complaint the relief sought by plaintiff under this Third Cause of Action was as follows (R. 39):

> "3. On plaintiff's Third Cause of Action:
>
> "(a) That 'Exhibit D' hereto attached be corrected or reformed to express the true intent of the parties, and to reconcile it with the full contract and agreement between the parties, particularly relating to the right to discharge plaintiff, by striking from section 20th of said 'Exhibit D' hereto attached the words 'either party hereto may without cause terminate this agreement upon thirty days written notice,' together with such other equitable relief as may appear proper in the premises;
>
> "(b) That the plaintiff be awarded judgment against the defendant for Four Hundred Eighty-Five Thousand Eight Hundred Sixty-Four Dollars and Forty-Two Cents ($485,864.42) together with interest thereon."

It is believed that an accurate and forthright analysis of the allegations of the First Amended Complaint which pertain to the Third Cause of Action, as supplemented by the Bill of Particulars (which became a part thereof pursuant to Rule 12 (e) of the Federal Rules of Civil Procedure) and an analysis of the relevant written instruments which are a part of the alleged Third Cause of Action are

essential if this Court is to consider the decisions below on their merits. Petitioner's petition and brief do not adequately state the material facts upon which the decision of the lower courts was based.

The Allegations of the Alleged Third Cause of Action

In the alleged Third Cause of Action plaintiff, by reference, incorporates allegations set forth in the first and second causes of action alleged in his First Amended Complaint. Obviously many of the allegations in the said first and second causes of action are not relevant or material to the alleged Third Cause of Action or to the relief sought by plaintiff therein.

The material and relevant allegations in the Third Cause of Action, as supplemented by the Bill of Particulars, are as follows:

From October 7, 1907, to and including August 22, 1936, plaintiff was an agent of defendant employed for the purpose of soliciting applications for life insurance (Par. III First Cause of Action, R. 27).

Annexed to the First Amended Complaint and made a part thereof and a part of the alleged Third Cause of Action are Exhibits "A", "B", "C", "D", "E" and "F" (Par. IV First Cause of Action, R. 27).

Exhibit "A" (R. 41) is the written agency agreement dated October 7, 1907, pursuant to which plaintiff was first employed by defendant as a part-time agent. This agreement was superseded by the written agreement dated January 1, 1908, which is Exhibit

"B" (R. 70). This agreement (Exhibit "B") was superseded by a subsequent written agreement dated August 17, 1910, which is plaintiff's Exhibit "C" (R. 80). This agreement (Exhibit "C") was superseded by the subsequent written agreement dated December 31, 1927, which is plaintiff's Exhibit "D" (R. 50). (Par. V First Cause of Action, R. 27-28).

The latter agreement (Exhibit D, R. 50) is the written agreement which was effective during the period commencing January 1, 1928 and ending August 22, 1936, the date as of which it was terminated by defendant upon thirty days written notice. This termination was in accordance with the provisions in paragraph 20th thereof wherein it is provided that "either party may without cause terminate this agreement upon thirty days written notice."

Likewise, in Exhibit "A", paragraph 18th (R. 47), in Exhibit "B", paragraph 18th (R. 76), and also in Exhibit "C", paragraph 18th (R. 86) it is provided that either party "may without cause terminate this agreement upon thirty days written notice."

In other words, in each of the successive written agency agreements which are a part of the complaint it was specifically provided that either plaintiff or defendant had the unrestricted right to terminate the agreements without cause upon thirty days written notice.

Exhibit "E" (R. 66) is a written agreement dated May 25, 1931, modifying the agency agreement (Exhibit"D") only in respect of the renewal commissions

payable to plaintiff (Par. V First Cause of Action, R. 27-28).

Exhibit "F" (R. 91) is described by plaintiff as "a system of benefits and partial compensation for its special soliciting agents * * * designated by the defendant as 'Nylic No. 2'." Plaintiff alleges that Exhibit "F" is a copy "of said 'Nylic' contract" (Par. VI First Cause of Action, R. 28-29).

It is alleged (Par. VI First Cause of Action, R. 28-29): "That agents of the defendant corporation, prior to the time the plaintiff entered into his first full-time contract with the defendant, and prior to plaintiff's application for membership in 'Nylic', orally represented to the plaintiff that a 'Nylic' system was to be reinstated by the defendant company, and further represented that if the same was reinstated, the plaintiff would have an opportunity to qualify for a life career in the insurance business with the defendant; provided the plaintiff could survive the requirements of the defendant for the first twenty years, during which period an agent could be discharged with or without cause."

In paragraph VII (First Cause of Action, R. 29) plaintiff asserts that "relying on said representations of the defendant's agents, on or about August 17, 1910, the plaintiff, in writing, made application to the defendant corporation for membership in said 'Nylic,' which application was accepted by the defendant in writing on September 26, 1910;" that defendant at that time gave time credit to plaintiff

for the years 1908, 1909 and 1910; and that said "Nylic" on and after September 26, 1910, was combined in each successive agreement entered into between plaintiff and defendant (which is contrary to the facts as shown by plaintiff's Exhibit "D", paragraph 23d, R. 65), and thereby became a part of the operating contract under which the parties operated (Par. VII, First Cause of Action, R. 29).

It is alleged that as *set forth in Nylic* 2 the Nylic system embraces the qualifying period of twenty years, "during which time the defendant reserved the right to discharge and disqualify the plaintiff with or without cause," (the facts as shown by plaintiff's Exhibits "D" and "F" are that there is no provision in Nylic about termination of the agency agreement); that the defendant did not exercise this right; and that on December 31, 1927, plaintiff qualified as a "Senior Nylic" (Par. VIII, First Cause of Action, R. 30).

Plaintiff alleges that on and after January 1, 1928, Nylic, as set forth in Exhibit "F" (R. 91), and the agency agreement marked Exhibit "D", being the agency agreement dated December 31, 1927, comprised the operating contract between the parties, and states that these "will hereafter be referred to herein as the contract" (Par. IX, First Cause of Action, R. 30).

Plaintiff charges that his qualifying period of Nylic was from January 1, 1908 to January 1, 1928, "according to the terms of 'Nylic 2' as set forth in

Exhibit 'F';" that on January 1, 1928, plaintiff qualified and was accepted as a Senior Nylic by defendant; "that it was an express and implied provision in his employment contract that he was to be employed and was to work for defendant for life, unless said contract was terminated for cause" (which allegation is a conclusion of the pleader contrary to the specific, unambiguous provision in the written agency agreement, plaintiff's Exhibit "D") (Par. II, Second Cause of Action, R. 32); and that "nevertheless, on or about the 23rd day of July, 1936, the defendant arbitrarily, in bad faith and without cause terminated and cancelled the plaintiff's said contract with the defendant already referred to because of malice and to avoid payment of benefits and renewal and conversion commissions to the plaintiff, thereby preventing the plaintiff from further performing his contract with the defendant and disqualifying him from earning a livelihood in the only profession and for the only company he was fitted and trained to serve" (Par. III, Second Cause of Action, R. 32-33).

It is alleged:

> "that section 20th (R. 58) of the agency agreement, marked 'Exhibit D' hereto attached, excluding the first line thereof, reads as follows:
>
> " 'Except as provided in Sections 2d, 5th, 13th and 17th hereof, the termination of this agreement shall in no way affect the right of the second party to any renewal commissions to which the second party would otherwise have been entitled if his employment by the first party had continued'."

Plaintiff asserted that he has at all times fully complied with Sections 2d, 5th, 13th and 17th of said agency agreement (Par. V, Second Cause of Action, R. 34).

It is alleged (Par. II, Third Cause of Action, R. 35) that as set forth in paragraph 1, on page 25 of Nylic 2 (Exhibit "F") (R. 106) he became entitled to receive "Senior Nylic" benefits so long as he lived, the benefits to continue for six months after his death to designated beneficiaries of plaintiff, provided that he "shall not enter the service of any other life insurance company."

It should be here pointed out that there is no charge that the defendant has failed or refused to pay plaintiff the so-called "Senior Nylic benefits." The Senior Nylic benefits to which plaintiff is entitled in accordance with Nylic 2 are not in controversy. It appears conclusively that since January 1, 1928, plaintiff has been and now is being paid by defendant the monthly payments provided by "Nylic 2" for Senior Nylics, and that the amount of each of said monthly payments is $354.89 (Bill of Particulars, R. 129).

It is charged (Par. III, Third Cause of Action, R. 35) that plaintiff has been "maliciously and wrongfully prevented by the defendant from further performing his contract with the defendant, in violation of all express and implied promises and representations made by defendant and its agents to the said plaintiff;" that plaintiff has been prevented by the defendant from earning a livelihood in his

life's profession either with the defendant or any other life insurance company; and that "defendant has maliciously and wrongfully taken and deprived plaintiff of the benefit of plaintiff's experience, association and good will built up over a period of 28 years of service in the defendant's organization."

In Paragraph IV of the Third Cause of Action (R. 36) it is alleged:

> "That line 1 of section 20th of the agency agreement, being 'Exhibit D' hereto attached, reads as follows:
>
> " 'Either party hereto may without cause terminate this agreement upon thirty days written notice.'
>
> "That said provision purporting to give the defendant the right to discharge the plaintiff without cause is superseded and modified by the 'Senior Nylic' contract which took effect January 1, 1928; that said contract expressly and impliedly provided for life benefits and employment for the plaintiff unless dismissed for cause. That said provision purporting to give the defendant the right to discharge the plaintiff without cause is contrary and repugnant to the express and implied intentions of the contracting parties, renders the agency agreement uncertain and inconsistent with the 'Nylic' portion of the contract, and is so oppressive to the plaintiff that it is against public policy."

Plaintiff then alleges (Par. V, Third Cause of Action, R. 36-37):

> "That by reason of the premises, the discharge of the plaintiff by the defendant was wrongful, and through loss of earnings to the plaintiff

occasioned by the defendant, plaintiff has been damaged in the amount of Four Hundred Eighty-Five Thousand Eight Hundred Sixty-Four Dollars and Forty-Two Cents ($485,864.42)."

An Analysis of the Relevant Written Instruments which Are a Part of the Alleged Third Cause of Action.

As a part of the Third Cause of Action plaintiff incorporated, among others, two written instruments which warrant careful consideration. The first is the agency agreement dated December 31, 1927—Exhibit "D" (R. 50)—and the second is "Nylic 2"—Exhibit "F" (R. 91), both of which are annexed to and made a part of the First Amended Complaint.

The Agency Agreement of December 31, 1927 — Exhibit "D"

The situation of the parties at the time they entered into the agency agreement of December 31, 1927, as shown by the allegations in the amended complaint, was as follows:

During the 17 year period expiring December 31, 1927, the agency agreement dated August 17, 1910 (plaintiff's Exhibit "C") was effective, time-credit having been given plaintiff for the years 1908, 1909 and 1910.

When plaintiff became a Senior Nylic on December 31, 1927, he became entitled to receive for life a Senior Nylic monthly income in an amount determined in accordance with the formula set forth in Nylic 2. This monthly income, in the amount of

$354.89 per month (Bill of Particulars, R. 129), is not in issue in this litigation. It has been and is now being paid to plaintiff monthly strictly in accordance with the provisions of Nylic 2, which will hereinafter be discussed in more detail.

Having become a Senior Nylic on December 31, 1927, there were no additional Nylic benefits which could thereafter be earned or obtained by plaintiff. Obviously, it would be to the advantage of plaintiff to obtain, if he could, an agency agreement which would provide for payment to him of larger renewal commissions in respect of policies thereafter issued on applications, if any, thereafter secured by him, than had been payable to him under the agency agreement of August 17, 1910 (Exhibit "C", R. 80). Such an agency agreement is offered to Senior Nylics by the company and was offered to and was accepted by plaintiff.

This is the agency agreement dated December 31, 1927—Exhibit "D"—which became effective January 1, 1928 (R. 50). It superseded the agency agreement of August 17, 1910—plaintiff's Exhibit "C" (R. 80).

Comparison of its provisions with the provisions of the prior agency agreement on August 17, 1910, reveals that the major provisions in both agreements are substantially the same. The only difference of substance is in respect of renewal commissions payable to plaintiff. Under the last agreement dated

December 31, 1927, renewal commissions payable to plaintiff are substantially larger in amount.

Under each of these agreements either party had the right to terminate the agreement without cause upon thirty days written notice. In Exhibit "C", the agreement dated August 17, 1910, the specific provision (R. 86) is:

> "18th. It is agreed that either party hereto may without cause terminate this agreement upon thirty days written notice."

In Exhibit "D", the agreement dated December 31, 1927, the specific provision R. 58) is:

> "20th. Either party hereto may without cause terminate this agreement upon thirty days written notice . . ."

In Exhibit "C" there is no mention of or reference of any kind or character to Nylic or Nylic 2.

In Exhibit "D" the only reference to Nylic is contained in paragraph 23d (R. 65), which is as follows:

> "23d. The second party shall not be eligible for membership in Nylic other than as a Senior Nylic under Nylic No. 2, it being understood and agreed that the execution of this agreement shall in no way alter or affect second party's Senior Nylic membership heretofore acquired subject to all the rules, regulations and conditions of Nylic No. 2."

Naturally there was no such provision in Exhibit "C" because until plaintiff became a Senior Nylic, which he did on December 31, 1927, he was eligible

for membership in Nylic so long as he conformed to the rules, regulations and conditions of Nylic 2.

There are no other provisions in either Exhibit "C" or Exhibit "D" which are relevant to plaintiff's alleged Third Cause of Action.

Before proceeding with an analysis of Nylic 2, it is deemed appropriate, as a summary, to emphasize and direct specific attention to the following facts which appear conclusively from the allegations in the First Amended Complaint and the Bill of Particulars:

(1) The written agency agreement dated December 31, 1927, specifically provided, as did the agency agreement dated August 17, 1910, that either party had the right to terminate the agreement without cause upon thirty days written notice.

(2) On July 23, 1936, the agency agreement of December 31, 1927, was upon thirty days written notice terminated by defendant, the effective date of the termination being August 22, 1936.

(3) None of the provisions of Nylic or Nylic 2 is a part of any of the agency agreements.

(4) No mention of or reference to Nylic or Nylic 2 is made in any agency agreement except the reference above quoted which is contained in paragraph 23d of the agency agreement of December 31, 1927.

(5) There is no ambiguity in any of the agency agreements.

(6) There is no ambiguity in Nylic 2, as will be hereinafter more specifically pointed out.

(7) There is no charge by plaintiff that defendant was guilty of fraud, deception or wrong-doing in respect of the execution of any of the agency agreements or in respect of Nylic 2. Nor is there any charge by plaintiff that he was deceived or was acting under a disability, duress, coercion or undue influence.

(8) The written agency agreement of December 31, 1927 (Exhibit "D") is not in any respect dependent upon or a part of any of the prior agency agreements (Exhibits "A", "B" or "C") and is not in any respect dependent upon or a part of "Nylic 2" (Exhibit "F").

"Nylic 2"

Nylic 2 is referred to by plaintff as "a system of benefits and partial compensation" for defendant's agents. Plaintiff alleges, as hereinabove pointed out, that on or about August 17, 1910, plaintiff in writing made application for membership in Nylic and that his application was accepted by defendant in writing on September 26, 1910 (R. 29).

Plaintiff further alleges that said Nylic "on and after September 26, 1910, was combined with each successive agreement entered into between the plaintiff and defendant corporation and thereby became a part of the operating contract under which the parties hereto operated" (R. 29).

An examination of the written agency agreements and the written provisions of Nylic 2, all of which are a part of the first amended complaint, will reveal conclusively that the facts are to the contrary. The

agency agreement was wholly independent of Nylic. The only relationship between Nylic 2 and the agency agreement is in the Nylic requirement that to be eligible for membership in Nylic the applicant must be employed by defendant under a written agency agreement; otherwise, the applicant would not be eligible to try for and could not obtain the Nylic benefits.

At page 7 of the printed Nylic 2 pamphlet (page 2, plaintiff's Exhibit "F", R. 92), it is stated:

> "The name is derived from combining the initials of the several words which make up our corporate name—New York Life Insurance Co.
>
> "Nylic is a body of persistent and successful men within the ranks of those who create the business of the New York Life Insurance Company.
>
> "It has been established in order to give permanency and character to the work of the soliciting agent. Its effect will be primarily to benefit the agent himself but the ultimate benefits will inure to the policy-holder of the Company."

The fundamental requirement of membership in Nylic 2 was that the applicant must have signed an agency agreement and must remain in good standing under it. Further requirements were that until the agent has become a Senior Nylic he must devote his entire time to the service of the company and personally produce every year at least $50,000 of insurance.

Nylic 2 provides, as a reward for the agent who meets the Nylic requirements, a monthly income not

related to the commissions provided for in the agency agreement but in addition thereto and contingent upon both the annual production of at least $50,000 insurance and the volume of business produced by the agent which had remained in force for the five preceding years, as well as upon compliance with the rules set forth in Nylic 2 (R. 91).

Th Nylic compensation (after five years of service as freshman "Nylics") was fixed roughly by the volume of business which had remained in force for the five preceding years, and upon the length of the agent's Nylic membership. The amount of the Nylic compensation was computed, not upon the amount of premiums collected but upon the amount of insurance written and continued in force for five years (R. 91).

After twenty years of Nylic membership a member became a Senior Nylic and as such was entitled to receive so long as he lived, whether he remained in the service of the company or not, provided only he did not enter the permanent service of another life insurance company, an income based roughly upon the average of his annual Nylic income for the past fifteen years (R. 107).

In the printed Nylic 2 pamphlet at page 25 (page 13, plaintiff's Exhibit "F", R. 106-107) under the heading "Senior Nylics," it is provided as follows:

> "Senior Nylics shall receive so long as they live, provided only they shall not enter the serv-

ice of any other life insurance company, monthly payments as follows:

"The *basis* of business for incomes for the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th years of continuous Nylic membership will be added together and divided by 15. The sum thus obtained will then be averaged with the amount of new business written and placed under the conditions provided above during that year of service as a Third Degree Nylic in which his production was smallest after deducting from same the amount of business placed during said smallest year which has lapsed by non-payment of premium, been canceled, or otherwise terminated up to December 31 of his twentieth Nylic year. His monthly income as a Senior Nylic shall be $0.75 per thousand on the average, or amount, thus obtained."

Plaintiff became a Senior Nylic on December 31, 1927.

Nylic 2 further provided for a pension in case of sickness of the agent (R. 108), as well as a death benefit in the form of a continuation of Nylic compensation for a period of six months after the death of the member (R. 110-111).

Among the general rules of Nylic (set forth here for convenience of the reader) are the following (R. 109-112):

"I. Every Nylic, except Senior Nylics, must devote his entire time, talents and energies to the service of the New York Life Insurance Company in soliciting personally for business. A

Nylic can have no other business or occupation for profit or gain.

"II. No agent, except a Senior Nylic, can continue to be a member of Nylic, who, in addition to devoting his entire time, talents and energies to the Company, does not produce each and every year on other lives than his own, at least $50,000 of insurance (Term and Child's and Pure Endowments excepted.) * * *

"IX. The Company will, for a period of six months, pay to any beneficiary designated in writing by the agent and filed with the Company at its Home Office, or, in lieu of such designated beneficiary, to the estate of any Nylic in good and regular standing in the First, Second or Third Degree, or Senior Nylic, upon his decease, whatever monthly income on account of Nylic the deceased may have been drawing at the time of his death.

"X. Any member of Nylic becoming incapacitated for work of any kind on account of temporary illness may, upon establishing to the Company's satisfaction the fact that said temporary illness was of such a character as to prevent his qualifying as a Nylic member for said year, have said year entirely eliminated from his Nylic record, leaving his future Nylic status to be adjusted by the Company accordingly, or, at the option of the Company have said year counted in Nylic, taking the actual paid business of said year as a basis for future Nylic payments depending on said year.

"XI. Any Nylic who shall in any calendar year pay for less than $50,000 of new insurance in accordance with these rules, shall thereby cease to be a member of Nylic, and all claim to

time credit or to any further payments from the Company on account of Nylic shall thereupon and thereafter be void and of no effect. The Company may cancel and terminate any agent's membership in Nylic and all benefits thereunder for violation of any Nylic rule or of any rule or regulation of the Company.

"XII. The termination of an agent's contract and agency, prior to his becoming a Senior Nylic, or the removal or transfer of an agent, prior to becoming a Senior Nylic, to any country where the Nylic benefits have not been extended by the Company to its agents, terminates his Nylic membership and all his Nylic rights.

"XV. This publication is issued subject to all the rules and regulations of the Company that govern the conduct of its business.

"XVI. The Company reserves the right in its discretion, at any time and from time to time, to alter, amend or repeal any and all of the rules and conditions of Nylic as herein expressed by later editions of this publication. Provided, however, such changes shall be effective as to future business only. No change shall be made in the amount of business which a member, under these rules, in good standing, shall be required to write to maintain membership, nor in the basis of the Nylic compensation of such member."

In Nylic 2 there is no reference of any kind or character to the member's agency agreement, except that one is not qualified to become a member of Nylic unless he has signed an agency agreement and remains in good standing under it.

In the printed Nylic 2 pamphlet—plaintiff's Ex-

hibit "F" (R. 91)—there are no other provisions which are relevant to plaintiff's alleged Third Cause of Action.

Before proceeding, it is deemed appropriate, as a summary, to emphasize and direct specific attention to the following facts which appear conclusively from the allegations in the First Amended Complaint and the Bill of Particulars:

(1) None of the provisions of Nylic 2 are a part of any agency agreement.

(2) The only reference in Nylic 2 to the agency agreement is the requirement that an applicant for membership in Nylic must have signed an agency agreement and until he becomes a Senior Nylic he must remain in good standing under it.

(3) When a member of Nylic becomes a Senior Nylic he may continue with the company, seek other employment, or retire, as he chooses.

(4) If a Senior Nylic elects not to continue in the company's service, his Senior Nylic benefits will not be jeopardized or affected by a termination of the agency agreement or a severance of his agency relationship with the company. Senior Nylic benefits are payable during the life of the agent and for six months after his death, provided only he does not enter the service of any other life insurance company.

(5) Plaintiff does not charge that defendant has failed to pay him the Senior Nylic benefits payable

to him for life in accordance with the provisions of Nylic 2.

(6) There is no word, phrase, provision or suggestion of any kind or character in Nylic 2 to the effect that a graduated Senior Nylic or Nylic undergraduate of any degree is employed by the company for life, or to the effect that his agency agreement may not be termniated by him or the company upon thirty days written notice in accordance with the specific provisions of the agency agreement.

(7) There is no charge by plaintiff that defendant was guilty of fraud, deception or wrong-doing in connection with plaintiff's application for a Nylic membership. Nor is there a charge by plaintiff that when he applied for such membership plaintiff was acting under a disability or duress or coercion or undue influence.

(8) There is no ambiguity in the provisions of Nylic 2.

(9) There is no provision in Nylic 2 which directly or indirectly modifies or changes any of the provisions of the agency agreement.

(10) There is no provision in Nylic 2 or the agency agreement which provides or reasonably may be construed to mean that membership in Nylic or the attainment of Senior Nylicship was intended to convert or did convert plaintiff's employment under his agency agreement from an employment which either party had the right to terminate at will, upon thirty days written notice (as specifically provided in the

agency agreement), into an employment for life which defendant had no right to terminate except for cause (as contended by plaintiff).

(11) There is not one word, phrase or provision in Nylic 2 or in any of the agency agreements to support plaintiff's conclusion (paragraph IV of Third Cause of Action, R. 36) that the "contract" which took effect January 1, 1928, "expressly and impliedly provided for life benefits and employment for the plaintiff unless dismissed for cause."

(12) There is not one word, phrase or provision in Nylic 2 or in any of the agency agreements (Exhibits "C" and "D") which supports plaintiff's conclusion that the specific provision in the agency agreement that either party may without cause terminate the agreement upon thirty days written notice is contrary and repugnant to the express or implied intentions of the parties, or the charge that the agency agreement is "uncertain and inconsistent with the Nylic portion of the contract, and is so oppressive to plaintiff that it is against public policy."

Alleged Oral Representations Relied Upon by Plaintiff to Contradict and Vary the Express, Unambiguous and Complete Terms of the Agency Agreement.

Plaintiff's Third Cause of Action was predicated solely upon his allegation (Par. V, Third Cause of Action; R. 36-37) that the discharge of plaintiff by defendant was wrongful.

Plaintiff recognized that if the defendant had the right to terminate his agency agreement dated

December 31, 1927 (Exhibit "D"), in accordance with the specific provisions in the agreement, plaintiff's Third Cause of Action would fail to state a claim against defendant upon which relief could be granted.

Consequently, in an effort to change and modify the plain, specific and unambiguous provisions of the complete written agency agreement, plaintiff alleged (Par. VI, First Cause of Action, R. 28) that "agents of defendant corporation *prior* to the time that the plaintiff entered into his first full-time contract with defendant (January 1, 1908), and *prior* to the plaintiff's application for membership in Nylic (August 17, 1910), orally represented to plaintiff that a Nylic system was to be reinstated by the defendant company, and further represented that if the same was reinstated the plaintiff *would have an opportunity to qualify for a life career in the insurance business with the defendant*, provided the plaintiff could survive the requirements of the defendant for the first twenty years during which period an agent could be discharged with or without cause." (Italics supplied.)

In the amended complaint we find no other allegations of facts (as distinguished from conclusions of the pleader) which could be relied upon by plaintiff as a basis for his prayer for reformation of the agency agreement, or as a basis for his prayer for damages in the amount of $485,864.42 which he sought to recover by reason of his claim that his discharge by defendant was "wrongful."

SUMMARY OF ARGUMENT

The District Court properly dismissed the third cause of action in plaintiff's First Amended Complaint, and the Circuit Court of Appeals properly affirmed.

Plaintiff's action was predicated solely upon his allegation that the termination of his written agency agreement with defendant was wrongful.

Plaintiff served as agent of defendant under a written agency agreement (dated December 31, 1927). In this agreement it is specifically provided that either plaintiff or defendant had the unrestricted right to terminate it upon 30 days' written notice.

In accordance with the express provision of the written agency agreement defendant, upon 30 days' written notice, terminated same, the termination being effective August 22, 1936.

Plaintiff sought reformation of the written agency agreement to eliminate the provision which vested in either party the unrestricted right to terminate it upon 30 days' written notice, and damages in the amount of $485,864.42 which plaintiff claimed he sustained by reason of the alleged wrongful termination.

It appears conclusively that there is no word, phrase provision or suggestion in the written agency agreement, or Nylic 2, or any other written instrument or prospectus which reasonably may be construed to provide or to suggest directly or indirectly that defendant agreed to employ plaintiff for life or

agreed this his employment would be terminable only for cause.

Consequently, it appears conclusively that there was no breach by defendant of any written agency agreement, or Nylic 2, or any other agreement, and no violation by defendant of any duty owed by it to plaintiff.

The express, unambiguous and complete terms of the written agency agreement may not be changed, modified or contradicted by the oral representations relied upon by plaintiff. These oral representations, made prior to August 17, 1910, as alleged and stated in the bill of particulars, were that in the event a Nylic system were reinstated by defendant plaintiff would have "an opportunity to qualify for a life career in the insurance business with defendant, provided plaintiff could survive the requirements of the defendant for the first 20 years during which period an agent could be discharged without cause." These are the only representations upon which plaintiff based the charge that his employment by defendant under the agency agreement of December 31, 1927, or under any other agreement was an employment for life which could not be terminated except for cause.

It is suggested that apart from all other considerations statements made to plaintiff, as alleged by him, that he "would have an opportunity to qualify for a life career in the insurance business with defendant" may not reasonably be considered or construed as cre-

ating a binding contractual obligation on the part of defendant to employ plaintiff for life.

Here, moreover, it conclusively appears that the agency agreement is complete in itself. It was formally executed. It is an agency agreement, not an insurance contract. The parties were dealing at arm's length. Plaintiff was under no disability. He did not charge mutual mistake, fraud, duress or undue influence. There was no fiduciary relationship between plaintiff and defendant. There is no issue in respect of public policy, either in fact or as a matter of law. There was no "consideration other than services to be performed." There was nothing novel or unique in the situation. There is no strange or unusual rule of evidence or construction here applicable.

The general rule which has been followed universally and the rule applicable here is that extrinsic or parol evidence is not admissible "to supply, contradict, enlarge or vary the words of a written contract, and when a contract is reduced to writing all matters of negotiation and discussion on the subject incident to the writing are excluded, being merged in the written instrument."

This rule is one of positive and substantive law and by the United States Supreme Court is considered as "unvariable and salutary."

The provisions in the written agency agreement that either party might terminate it without cause were not, as contended by plaintiff, "contrary and repugnant to the express and implied intentions" of

the parties, and as a matter of fact and law are not oppressive or against public policy.

In addition, alleged contracts for life employment are so unusual that the burden is upon the person claiming under such a contract to allege and prove explicit authority in the representative of the corporate employer to make such a contract in its behalf. Here there was no allegation of such a character. If plaintiff proved all the facts alleged, the most that he could possibly have established would have been an unauthorized contract of hiring not enforceable against the corporation.

Moreover, the allegations in the third cause of action were not sufficient to sustain a decree for reformation as prayed. There was no allegation of fraud, bad faith or inequitable conduct. There was no allegation of mutual mistake. There was no allegation that the written words in the agency agreement, express or contain the real intention of neither of the parties.

There was in fact, contrary to the assertions of petitioner, no contemporaneous oral agreement alleged by plaintiff which could possibly be consistent with the express provisions of the subsequently executed written agreement in which it is provided that either party had the right to terminate the agreement on 30 days' written notice.

In addition, if it be considered that the facts alleged by plaintiff might possibly be construed as alleging a contemporaneous oral agreement, as petitioner seems

to contend, such an agreement would be void under the Statute of Frauds because it could not possibly have been performed within one year from the making thereof. Obviously, performance would have been impossible prior to December 31, 1927, which is more than 17 years after it is claimed by plaintiff that the alleged representations were made.

It follows that it appears conclusively from the allegations of the complaint and the bill of particulars (1) that defendant had the unrestricted right to terminate plaintiff's employment as specifically provided in the Agency Agreement; (2) that there has been no breach by defendant of any of the Agency Agreements or Nylic 2 or any other agreement and no violation of any duty owed by defendant to plaintiff; (3) that the Third Cause of Action does not state a claim under which the court might properly enter a decree reforming the Agency Agreement, Exhibit "D", or grant plaintiff any other equitable relief as prayed; and (4) that the allegations in the Third Cause of Action do not state a claim under which the court might properly enter judgment in favor of plaintiff in any sum for damages claimed to have been suffered by reason by the termination of plaintiff's employment.

The judgment of dismissal entered by the District Court was properly affirmed by the Circuit Court of Appeals.

ARGUMENT

I.

There Is No Legal Relationship Between Nylic 2 and any of the Agency Agreements

Contrary to the assertions of petitioner, it conclusively appears from the allegations of the Complaint and the exhibits which are a part thereof that the only relationship between Nylic 2 and any agency agreement is that to become eligible for membership in Nylic the applicant must be employed by defendant under an agency agreement, and in addition he must, until he has become a Senior Nylic, remain in good standing under the agency agreement.

In this case plaintiff, for example, would not have been eligible for membership in Nylic if he had not been employed by defendant under an agency agreement. This agreement is the agency agreement of August 17, 1910 (Exhibit "C" attached to the Complaint). If at any time during the 17-year period expiring December 31, 1927, either plaintiff or defendant had terminated this agency agreement, with or without cause, as either clearly had the right to do, plaintiff's Nylic membership would have terminated, as provided in Nylic General Rule XII.

Obviously there were agents having agency agreements with defendant who did not apply for or hold a membership in Nylic. There were other agents, having agency agreements, who applied for membership in Nylic, as did plaintiff.

After an application for Nylic membership was

accepted, the applicant became a freshman Nylic. If he met the annual minimum requirements of Nylic, as to production and complied with the other requirements of Nylic, and his agency agreement was not terminated by him or the Company, he might become a first degree, then a second degree, then a third degree and finally a Senior Nylic.

During the period required to attain the status of a Senior Nylic the agent was paid commissions in accordance with the provisions in the agency agreement consisting of both first year and renewal commissions. These commissions were a fixed percentage of the premiums collected for the policies issued upon applications secured by the agent and were paid to the agent in accordance with the provisions of the agency agreement, even though the agent did not meet the minimum requirement for continued membership in Nylic, and even though the agent might lose his membership in Nylic.

The Nylic benefits, which constitute additional reward if earned by the agent, are paid to him monthly throughout the 20-year Nylic period, and are based upon the principal amount of the policies issued upon applications procured by the agent and kept in force. The amount of the premiums charged for these policies is not a factor in the computation of the Nylic monthly payments.

If the agency agreement be terminated by either the agent or the Company after the agent has become a first, second or third degree Nylic and before he

has been accepted as a Senior Nylic, the agent is no longer eligible to receive Nylic benefits and consequently the Nylic benefits, if any, which he had been receiving prior to the termination of the agency agreement are not thereafter paid to him. At all times, however, wholly independent of any provision of Nylic and wholly independent of the continuous maintenance of the agent's Nylic membership in good standing, the agent's rights to commissions are fixed by the agency agreement.

Upon being accepted as a Senior Nylic, as was plaintiff (December 31, 1927), the agent is entitled to the Senior Nylic benefits for life as provided in Nylic 2. . Consequently, a termination of the agency agreement of a Senior Nylic, by either the agent or the Company, has no effect upon the monthly payments for life to which a Senior Nylic has become entitled. It follows that once having attained the status of a Senior Nylic the agent, as a Nylic graduate, has obtained the maximum benefits of Nylic 2, and thereafter there is nothing that can be done by the agent or the Company which will increase or decrease the Senior Nylic monthly income which is payable to a Senior Nylic for life.

The case of plaintiff is a graphic illustration. As shown by the pleadings, on December 31, 1927, when plaintiff became a Senior Nylic, he had earned the right to receive for life an income of $354.89 per month. Each month since January 1, 1928, plaintiff has received this amount from defendant and will

continue to receive a like amount each month so long as he lives. This means that the aggregate amount of Senior Nylic monthly payments received by plaintiff from the Company to date is in excess of $79,495.36 and that in addition plaintiff will receive $4,258.68 each year during the remainder of his life, provided he does "not enter the service of another life insurance company" in violation of the rule of Nylic 2 applicable to Senior Nylics.

The foregoing sums are the amounts paid to plaintiff as Senior Nylic benefits since December 31, 1927. During the 20-year period prior to December 31, 1927, plaintiff also received the very substantial commissions, first year and renewal, which are provided for in the agency agreement of August 17, 1910, and the Nylic payments payable prior to January 1, 1928, as provided in Nylic 2.

To obtain the said monthly Senior Nylic payments for life plaintiff was not required to continue in the service of defendant after December 31, 1927. On January 1, 1928, he was and now is, as he was at all times prior thereto, free to engage in any other business he might prefer.

If plaintiff had not desired to continue as an agent of defendant, he was nevertheless free to continue in the life insurance business. If he entered the service of any other life insurance company in violation of the rule of Nylic 2 that a Senior Nylic may not "enter the service of another life insurance company," the Company would be released from its obligation to

continue said monthly Senior Nylic payments. In this case there is no occasion or necessity for considering the effect of such a prohibition or the question as to what would or would not constitute entering "the service of another life insurance company," for two obvious reasons: The first is that plaintiff alleges that he did not enter the service of another life insurance company, and the second is that the Company has paid and is now paying plaintiff the monthly Senior Nylic payments strictly in accordance with the provisions of Nylic 2.

In this connection it seems appropriate to point out that after the termination of the agency agreement in 1936 plaintiff continued in the life insurance business. In the Bill of Particulars (R. 128-129) plaintiff states that policies of life insurance were issued during the years 1937, 1938 and 1939 by numerous life insurance companies other than defendant, on applications procured by plaintiff. This, it appears, was not deemed by plaintiff or defendant to be a violation of the Nylic 2 prohibition against a Senior Nylic "entering the service of another life insurance company."

On December 31, 1927, when plaintiff became a Senior Nylic he had then obtained, as before indicated, the maximum Nylic benefits. There were no other or further Nylic benefits of any kind or character which he could thereafter acquire. There is no provision whereby having graduated and attained the status of Senior Nylic, an agent may go forward in an

effort to become a double Senior Nylic or to increase his Senior Nylic benefits.

Plaintiff indicated a desire to continue as an agent of the defendant. Naturally, since there was no possibility of plaintiff obtaining any greater Nylic benefits, it was in the interest of plaintiff to obtain, if he could, a new agency agreement, under which larger renewal commissions would be payable to him than were payable in accordance with the agency agreement under which he had been working during the 20-year period of his Nylic membership. The result of his negotiations with defendant was the new and last agency agreement of December 31, 1927 (Exhibit "D" attached to First Amended Complaint).

It seems definite and certain that neither in this agency agreement nor in Nylic 2 is there any support for plaintiff's assertion that the agency agreement (Exhibit "D") is a part of or has any legal relationship to Nylic 2, or that Nylic 2 is a part of or has any legal relationship to the agency agreement. Each of the agency agreements is wholly independent of and separate and apart from Nylic 2, and Nylic 2 is wholly independent of and separate and apart from each of the agency agreements. The allegations in the amended complaint and plaintiff's exhibits which are a part thereof may not be reasonably construed otherwise.

II.

Each Agency Agreement Is Wholly Independent of and Separate and Apart from any Preceding Agency Agreement and Nylic 2.

Likewise, there is not in any of the agency agreements or in Nylic 2 the slightest support for plaintiff's assertion that the agreement of December 31, 1927 (Exhibit "D"), is a part of or has any relationship to the agency agreement of August 17, 1910 (Exhibit "C"). Each of the agency agreements is independent of and separate and apart from any preceding agency agreement. This is shown not only by the agreements themselves but also by the allegations contained in paragraph V of the First Cause of Action in the First Amended Complaint (R. 27).

It is alleged by plaintiff that the agency agreement of October 7, 1907 (Exhibit "A") was superseded by the agency agreement of January 1, 1908 (Exhibit "B").

It is also alleged that the agreement of January 1, 1908 (Exhibit "B") was superseded by the agency agreement of August 17, 1910 (Exhibit "C").

Likewise, as alleged by plaintiff, the agency agreement of August 17, 1910 (Exhibit "C") was superseded by the agency agreement of December 31, 1927 (Exhibit "D").

The agency agreements which are before the court as a part of plaintiff's amended complaint may not be reasonably construed otherwise.

III.

It Appears Conclusively from the Complaint and the Bill of Particulars that There has Been No Breach by Defendant of any of the Agency Agreements or Nylic 2, or any other Agreement, and no Violation by Defendant of any Duty Owed by it to Plaintiff.

Each of the agency agreements, including the agreement of December 31, 1927 (Exhibit "D") was terminable by either of the parties upon thirty days' written notice.

As before indicated, there is not one word, phrase or sentence in any of the agency agreements which may reasonably be construed to suggest, directly or indirectly, that defendant agreed to employ plaintiff for life, or agreed that plaintiff's employment would be terminable only for cause.

To the contrary, it appears conclusively from the allegations in the First Amended Complaint and the Exhibits which are a part thereof that plaintiff signed four separate and independent written agency agreements, the first on October 7, 1907, the second on January 1, 1908, the third on August 17, 1910, and the fourth and last on December 31, 1927; and in each of these agency agreements it is specifically provided that each may be terminated by either party upon thirty days' written notice.

The last agreement (Exhibit "D") was terminated by defendant upon thirty days' written notice, the notice of termination being dated July 23, 1936.

It follows that the termination of the agency agree-

ment of December 31, 1927, was not a violation of any agreement or a breach of any duty owed by defendant to plaintiff.

It also appears conclusively from the complaint and the bill of particulars that there has been no breach by defendant of Nylic 2.

Moreover, there is no charge here that plaintiff has not been paid all sums payable to him in accordance with the provisions of Nylic 2. All such sums have been paid to him.

Nor is there any provision in Nylic 2 that any Nylic member or Senior Nylic should have permanent employment as an agent. At most, as suggested by the District Court, there are only expressions of the desirability of permanency of agency, which expressions apply just as much to such desirability from the standpoint of the company as from that of the agent and apply just as much to the period before as the period after an agent became a Senior Nylic.

Moreover, "permanent employment" is not necessarily synonymous with "lifetime employment." As stated by the District Court (R. 150):

> "According to the dictionaries and numerous legal decisions the term 'permanent' as applied to employment means that it is contrasted with temporary employment. In fact, in plaintiff's brief we find that 'permanent employment' is the antonym of 'temporary employment.' Therefore, it appears that any employment which is sufficiently long as clearly not to be temporary would be permanent. In such connection see *McKelvy v. Choctaw Cotton Oil Co.*, 152 Pac. 414;

Combs v. Standard Oil Co. of Louisiana, 59 S.W. (2d) 525; *Faulkner v. Des Moines Drug Co.*, 90 N.W. 585, 586; *New England Mutual Life Ins. Co. of Boston, Mass. v. Hurst*, 199 Atl. 822, 826."

Consequently, it conclusively appears that defendant's termination of the agency agreement of December 31, 1927, was not a breach of Nylic 2.

If it be assumed, however (contrary to the facts) that under the terms of Nylic or the oral representations alleged to have been made to him in 1908 or 1910, plaintiff, prior to December 31, 1927, upon becoming a Senior Nylic was on January 1, 1928, entitled to a life agency in spite of the clause of the agency contract then in force (Exhibit "C") providing for termination on notice, plaintiff cannot prevail. In the language of the District Court (R. 151-152):

> "Plaintiff certainly could have exchanged any such right to a life agency for a terminable agency after he became a Senior Nylic, which terminable agency should entitle him to a greater compensation.
>
> "Exhibit 'D' provided for a higher schedule of compensation to plaintiff as a soliciting agent effective the same day plaintiff was to become a Senior Nylic and specified in unmistakable words:
>
> " 'Either party hereto may without cause terminate this agreement upon thirty days' written notice.'
>
> "If Exhibit 'D' and Nylic 2 be deemed but parts of one contract, as plaintiff contends they should be, we still find two specifications — first, that

the period of plaintiff's agency is subject to section 20 of Exhibit 'D' and may be terminated as therein provided; and second, that Exhibit 'D' shall not affect plaintiff's Senior Nylic membership. In other words, the parties agreed that the agency might be terminated by either party without cause but that the Senior Nylic membership should nevertheless continue.

"To me the conclusion is unescapable that whether previously plaintiff did or did not have the right to a lifetime agency as a Senior Nylic in any event he surrendered any such right by entering into Exhibit 'D' with its higher schedule of compensation.

"It cannot be overlooked that Exhibit 'D' was made in contemplation of plaintiff's being a Senior Nylic for it expressly specified that plaintiff could only be a Senior Nylic during its effective life. Exhibit 'D' nevertheless provided for agency termination without cause."

Plaintiff asserts, erroneously, that "it was an expressed and implied provision in the operating contract that plaintiff was to be employed by the defendant for life unless said contract was terminated for cause."

There is no provision in any of the written agency agreements or in Nylic 2 which may reasonably be so construed.

Petitioner, in his brief (Br. 22) as he did below refers to Nylic Rule XII, which provides that the termination of an agent's contract or agency prior to his becoming a Senior Nylic terminates his Nylic membership and all his Nylic rights. This provision

is clear and unambiguous. It means only, that in the event the agency agreement be terminated before the agent has been awarded the maximum rights which a Senior Nylic may obtain, the agent loses any rights he may have theretofore acquired as a first, second or third degree Nylic. Having once attained the status of a Senior Nylic, then the right of the agent to receive thereafter the maximum Senior Nylic benefits, as provided in Nylic 2, becomes wholly independent of any agency agreement. The termination of an agency agreement thereafter would not have the slightest effect upon the right of the agent to such Senior Nylic benefits. This is all that said provision means. It may not reasonably be construed to mean anything else.

Petitioner refers (Br. 24, 25) to paragraph 23 of the agency agreement of December 31, 1927 (Ex. "D"), in which it is provided that plaintiff shall not be eligible after December 31, 1927, for membership in Nylic other than as a Senior Nylic, "it being understood and agreed that the execution of this agreement shall in no way alter or affect the second party's Senior Nylic membership heretofore acquired subject to all the rules, regulations and conditions of Nylic No. 2."

In the written opinion of the District Court, as before indicated, it is stated (R. 151, 152):

> "If Exhibit 'D' and Nylic 2 be deemed but parts of one contract, as plaintiff contends they should be, we still find two specifications — first, that the period of plaintiff's agency is subject to section 20 of Exhibit 'D' and may be terminated

as therein provided; and second, that Exhibit 'D' shall not affect plaintiff's Senior Nylic membership. In other words, the parties agreed that the agency might be terminated by either party without cause but that the Senior Nylic membership should nevertheless continue. (As provided in paragraph 23 of Exhibit 'D'). * * *

"It cannot be overlooked that Exhibit 'D' was made in contemplation of plaintiff's being a Senior Nylic for it expressly specified (in paragraph 23) that plaintiff could only be a Senior Nylic during its effective life. Exhibit 'D' nevertheless provided, for agency termination without cause." (Words in parentheses have been supplied)

Petitioner argues (Br. 25) fallaciously, we suggest, that:

"The result of paragraph 23 (Ex. D, R. 65) *supra*, is either to make the employment contract subservient to all the rights heretofore acquired by appellant under Nylic No. 2 (Ex. F), or in any event to render the effect of the execution of the employment contract so uncertain and ambiguous as to allow the introduction of parol evidence as outlined on appellant's bill of particulars (R. 125)."

There is in fact not one word in said paragraph 23 which even remotely suggests that the agency agreement (Ex. D) is "subservient" to Nylic 2 or to any prior agency agreement. The provision means precisely what the language thereof indicates. When plaintiff became a Senior Nylic, as pointed out before, he was no longer eligible for any additional Nylic benefits. The rights incident to his *Senior Nylic mem-*

bership which he had already acquired naturally remained unaffected and unaltered by the new agency agreement Exhibit D. In simple language this understanding and agreement are set forth in paragraph 23. There is no ambiguity. There is no uncertainty.

Nor may said provision, it is submitted, be reasonably construed to be an agreement that plaintiff's employment under the agency agreement was an employment for life in direct contravention of the specific and unambiguous written provisions thereof.

Petitioner states (Br. 25) that in the bill of particulars it is alleged that a Mr. A. S. Elford, in the capacity of Inspector of Agencies of defendant's Western Department in Seattle, about August 1, 1928, represented to plaintiff, that Section 20 of the agency agreement (Exhibit D) did not apply to plaintiff as a Senior Nylic. Plaintiff argues erroneously that "evidence of this nature is admissible whenever there is an uncertainty as to the nature of an instrument or the intention of the parties to execute the contract, thus, conversations during negotiations may be shown in considering a contract in case of doubt as to meaning of words." This argument of plaintiff, it is suggested, is fallacious for many reasons, among others the following:

There can be no doubt about the meaning of the written words. There is no uncertainty as to the nature of the written agreement or the intention of the parties "to execute the contract."

There is no suggestion that this alleged oral state-

ment of Mr. Elford was made prior to the execution and delivery of Exhibit "D" by plaintiff. If it were made before, then it would be inadmissible because all prior negotiations (if the alleged oral statement may be considered as part of the negotiations) were merged into the subsequently executed written agreement; if after, the alleged oral statement would not be admissible because it would be a delayed attempt to change the specific provisions of a written instrument by parol testimony.

The alleged oral representations *per se* may be reasonably construed to mean only that in the event the agency agreement be terminated as provided in paragraph 20, plaintiff's prior acquired status and rights as a graduate Senior Nylic would not thereby be terminated.

There is no allegation of fact which establishes the slightest authority in Mr. Elford, the Superintendent of Agencies, to make any agency agreement with plaintiff, or to alter or amend or interpret the legal effect of the written provisions of the agency agreement.

There is no situation shown by the allegations which warrants a presumption that plaintiff had any right to rely upon said oral interpretation of the provisions of the written agreement, and as a matter of elementary law plaintiff had no right to rely upon any such interpretation.

As stated in *Johnston v. Spokane & Inland Empire R. Co.*, 104 Wash. 562, 177 Pac. 810, "a party whose

rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein."

Apart from all of the foregoing reasons, if it be assumed that the entire Paragraph 20 of Exhibit D had been stricken from the contract by reason of the oral representations of Mr. Elford, there would have remained only an agreement for the employment of plaintiff as an agent of defendant for an indefinite time. Such a hiring, as a matter of law, is a hiring at will and no action can be sustained in such a case for an alleged wrongful discharge.

In addition, if the agreement Exhibit D had not superseded the agreement Exhibit C, as it did, the prior agreement would have continued in full force and effect until terminated and under Section 18th thereof (R. 86), as before pointed out, either party had a right to terminate the agreement at will upon thirty days' notice.

Consequently, it is submitted that the alleged oral representations of Mr. Elford, as set forth in the bill of particulars, if made, would be of no factual or legal significance. Petitioner rather intemperately criticizes the Nylic contract (Br. 21). Aside from the immateriality of the outburst and its lack of proper place in a brief before this Court, it may be said that apparently "diabolical slavery" is not a complete description of an arrangement which peti-

tioner alleges to have paid him $28,500 per year and which still pays him retirement pay of $4,285.68 per year for life. There was no slavery about the relationship. Petitioner was not "bound" to respondent for a single moment. He retained at all times the unrestricted right to cease his representation of the company. He was free to do as he wished.

The foundation of the agency relationship was the agency agreement. It—not Nylic 2, — was the "body and trunk of the tree." Unless there be an agency agreement the agent is not eligible to membership in Nylic. A termination of the agency agreement *ipso facto* terminated the Nylic membership and all Nylic benefits except only the benefits to which one who had become a Senior Nylic—a Nylic alumnus—was entitled under the provisions of Nylic 2. These are the specific unambiguous provisions in Nylic 2, as before pointed out in more detail. The basic permanent contract is not Nylic 2. It is and always has been the agency agreement which is the *sine qua non*. Without an agency agreement there can be no Nylic contract and no active membership in Nylic.

There are agents who are not members of Nylic. There are no members of Nylic who do not have an agency agreement with defendant in full force and effect throughout the agent's active Nylic membership. After the agent becomes a Senior Nylic he is no longer an active member of Nylic. He is an alumnus. As a Senior Nylic he is entitled to the full

Senior Nylic benefits even though he does not continue as an agent of the defendant.

Contrary to the suggestions of petitioner (Br. 22), a Senior Nylic is not prohibited from writing insurance for any other company, as shown by the bill of particulars (R. 128, 129) he has written a substantial amount of insurance for other companies since August 22, 1936. Nor was he prohibited from engaging in any other business or occupation for profit or gain (R. 109).

Petitioner's statement (Br. 28) that he is still a Nylic is erroneous. Plaintiff was an undergraduate *Nylic* in good contractual standing until he became a *Senior Nylic*. After he became a Senior Nylic he was thereafter only a Senior Nylic and as such he was not required to devote any "of his time, talents and energies" to the service of defendant (R. 109).

The cases cited by petitioner (Br. 32, 33) are obviously not in point. Here plaintiff was not bound to serve defendant for any length of time. He was free to quit any time he desired. During the period prior to December 31, 1927, so long as plaintiff chose to continue as an agent of defendant, he was required, and properly so it seems, to devote his time exclusively to the business of defendant. That obligation, however, did not continue one second longer than plaintiff desired it to continue, and after December 31, 1927, there was no such obligation.

IV.

The Express, Unambiguous and Complete Terms of the Applicable Written Agency Agreement May Not Be Changed, Modified or Contradicted by the Representations Relied Upon by Plaintiff.

Plaintiff alleged, as before indicated, that prior to the time that plaintiff entered into his first full-time contract and prior to his application for membership in "Nylic," agents of the defendant (whose identity and authority are not alleged) "orally represented to the plaintiff that a 'Nylic' system was to be reinstated by the defendant company, and further represented that if the same was reinstated, the plaintiff would have an opportunity to qualify for a life career in the insurance business with the defendant; provided plaintiff could survive the requirement of the defendant for the first twenty years, during which period an agent could be discharged with or without cause."

These, it appears from the First Amended Complaint and the Bill of Particulars, are the oral representations and the only representations — oral or written — upon which plaintiff may base a charge that his employment by the defendant under the agency agreement dated December 31, 1927, was an employment for life which defendant had no right to terminate at will even though the written agency agreement dated December 31, 1927, and executed at least 17 years after the alleged oral representations

were made, specifically provided that either party had the right to terminate it without cause.

It is suggested that apart from all other considerations statements made to plaintiff, as alleged by him, that he "would have an opportunity to qualify for a life career in the life insurance business with defendant" may not reasonably be considered or construed as creating a binding contractual obligation on the part of defendant to employ plaintiff for life. There was, in fact, no contemporaneous oral agreement at all.

Moreover here, as shown conclusively by the amended complaint and plaintiff's exhibits, the written agency agreement (Exhibit "D") is complete in itself. It was formally executed. It provides that it may be terminated without cause by either of the parties upon thirty days' written notice. It is not an insurance contract. It is an agency agreement. The parties were dealing at arms length. The plaintiff was under no disability. He does not charge mutual mistake, fraud, duress or undue influence. There is no fiduciary relationship between plaintiff and defendant, either in fact or as a matter of law. There is no issue in respect of public policy, either in fact or as a matter of law. There is no "consideration other than services to be performed," either in fact or as a matter of law. Any agent who leaves any prior employment to become a representative of a life insurance company naturally gives up the prior employment. There is nothing novel or unique in such a situation.

In addition, it appears conclusively, that the alleged oral statements or representations could not possibly be consistent with the express provisions of the subsequently executed written agreement. It provides specifically that either party had the right to terminate the agreement on thirty days' written notice. Whatever the prior representations may have been as to the term of plaintiff's employment, they were merged into the written agreement which is definite, certain, unambiguous and complete.

Here there is no strange or unusual rule of evidence or construction which would be applicable. There is not the slightest ambiguity in the written agreements or Nylic 2.

Plaintiff makes vague and obscure charges of "maliciousness." These, we suggest, are not material to any issue presently before the court. Since the agreement may be lawfully terminated at will of either of the parties, the presence or absence of malice would be of no legal significance.

The general rule, universally followed and here applicable and controlling, is that extrinsic or parol evidence may not be relied upon "to supply, contradict, enlarge or vary the words of a written contract." When a contract is reduced to writing "all matters of negotiation and discussion of the subject incident to the writing are excluded, being merged in the written intsrument."

Ferguson v. Lumbermen's Ins. Co., 45 Wash. 209, 211, 88 Pac. 128;

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Allen v. Farmers & Merchants Bank of Wenatchee, 76 Wash. 51, 56, 135 Pac. 621;

Olsen v. Nichols, 86 Wash. 185, 187, 149 Pac. 668;

Union Machinery & Supply Co. v. Darnell, 89 Wash. 230, 234, 154 Pac. 183;

Van Doren R. & Co. v. Guardian Cas. & G. Co., 99 Wash. 68, 168 Pac. 1124;

Thompson & Stacy Co. v. Evans, Coleman & Evans, 100 Wash. 277, 283, 170 Pac. 578;

Shannon v. Prawl, 115 Wash. 106, 112, 196 Pac. 635;

Benson v. Metropolitan Life Ins. Co., 126 Wash. 125, 217 Pac. 709;

Samarzich v. Aetna Life Ins. Co., 180 Wash. 379, 385, 49 P.(2d) 129;

Asher Bros. General Illuminating Co. v. General Illuminating Co., 193 Wash. 105, 108, 74 P.(2d) 495;

Sears, Roebuck & Co. v. Nicholas, 2 Wn.(2d) 128, 132, 97 P.(2d) 633;

Smith v. Johnson, 2 Wn.(2d) 351, 359, 98 P.(2d) 351;

Alaska Pacific Salmon Co. v. Matthewson, 3 Wn.(2d) 560, 563, 101 P.(2d) 606.

The foregoing are some of the numerous authorities relied upon by defendant to sustain the point above stated.

This rule is followed without exception in the Federal Courts.

20 Am. Jur., Section 1099, p. 958 (See foot-

note 9, in which many Federal Court cases are cited).

In *Northern Assurance Co. v. Grand View Building Association*, 183 U.S. 308, 46 L. ed. 213, 227, the court states that this rule "has been treated by this court as unvariable and salutary."

Moreover, as stated in 20 Am. Jur., Section 1100, page 963, the rule "is not one merely of evidence, but is one of positive or substantive law founded upon the substantive rights of the parties." Consequently, "evidence properly falling within the inhibition of the rule does not become admissible merely because it has probative value or is not objected to." *McGregor v. Farmers-Merchants Bank*, 180 Wash. 440, 444, 40 P.(2d) 144.

V.

The Provision in the Agency Agreement that Either Party May Terminate it Without Cause Is Not In Fact "Contrary and Repugnant to the Express and Implied Intentions" of the Parties, and as a Matter of Fact and Law is not Oppressive or Against Public Policy.

Plaintiff alleges (Par. IV, Third Cause of Action, R. 36) that the provision in the agency agreement that either party had the right to terminate it without cause "is contrary and repugnant to the express and implied intentions of the contracting parties and is so oppressive to the plaintiff that it is against public policy."

It is the position of the defendant (1) that it appears conclusively from the plain, unambiguous and

comprehensive provisions of the written agency agreement that the parties intended to agree and did agree specifically and in writing that either party had the right to terminate the agency agreement with or without cause, and that obviously there was not and could not be an "implied intention" to the contrary; and (2) that as a matter of law neither said provision nor any other provision in the agency agreement or Nylic 2 is oppressive or against public policy.

In each of the following cases the identical form of agency agreement and Nylic 2 which are before the court in the instant case were considered and enforced:

Moser v. New York Life Ins. Co. (C.C.A. 9) 151 F.(2d) 396;

Bone v. New York Life Ins. Co. (Minn. 1925) 206 N.W. 452;

Russell v. New York Life Ins. Co., 261 N.Y. S. 943;

Schwartz v. New York Life Ins. Co., 286 N.Y.S. 873.

These cases are the only cases of record so far as we know in which a court has had before it the identical forms of agency agreement and Nylic 2 which are here before the court. In each of these cases the court considered as valid all of the provisions of the agency agreement and Nylic 2 which were then in controversy. In none of them did the court either directly or indirectly hold or suggest that any provision of the agency agreement or Nylic was oppressive or against public policy even though a termination

of the agency agreement by the company, in accordance with the provisions thereof, caused the agent to lose renewal commissions or Nylic benefits which he had been receiving.

In the instant case the termination of the agency agreement did not cause plaintiff to lose any renewal commissions, Nylic monthly payments or the Senior Nylic benefits, which he was entitled to receive in accordance with the provisions of the agency agreement and Nylic 2. These, as before pointed out, are not involved in this litigation. Senior Nylic payments have been and now are being paid plaintiff in accordance with the provisions of Nylic 2.

In cases in which a court has been called upon to consider the question, it has been uniformly held that a provision for termination of an agency agreement without cause was not oppressive or inequitable or against public policy even though such a termination had the legal effect of terminating the agent's rights to renewal commissions or to benefits or bonuses to which the agent would have been entitled if the agreement had not been terminated.

Butler v. New York Life Ins. Co., 45 Wash. 141, 87 Pac. 1119;

McPherrin v. Sun Life Assur. Co. of Canada (Iowa 1934) 257 N.W. 316;

Andrews v. Public Savings Ins. Co. of America (Ind. 1923) 141 N.E. 646;

Barr v. Sun Life Assur. Co. of Canada (Fla. 1941) 200 So. 240;

Wallace v. American Life Ins. Co. of Des Moines, Iowa, 237 Pac. 976;
Sutherland v. Connecticut Mutual Life Ins. Co., 149 N.Y.S. 1008, 1012.

Petitioner complains about the rule of Nylic which provides that Senior Nylics shall receive the monthly payments agreed upon so long as they live "provided only they shall not enter the service of another life insurance company."

It is deemed appropriate to point out the following facts about which there is and it is believed there reasonably can be no controversy:

There is no restriction in any of the agency agreements or Nylic 2 which prevents plaintiff from selling insurance for any other life insurance company. He is free to do precisely as he pleases. He is not deprived of the "right to earn a livelihood."

There is no issue in respect of plaintiff's Senior Nylic benefits. He is not here complaining that these have not been paid. He is not charging that defendant has refused to pay them or that defendant is claiming the right to stop payment.

Plaintiff alleges that he has not entered the service of any other life insurance company and he does not allege that he has any desire to do so.

This is not an action for a declaratory judgment in which plaintiff sees or may obtain a judicial determination of the legal effect of a violation by him of the said provisions of Nylic 2.

VI.

"Other than the Services to be Performed" There Was No Consideration Passing from Plaintiff to Defendant which may be Considered as a Legally Sufficient Consideration for an Agreement to Employ Plaintiff for Life.

The rule universally recognized is that a contract for permanent employment, for life employment, or for other terms purporting permanent employment, where the employe furnishes no consideration additional to the services incident to the employment, is nothing more than an indefinte general hiring, terminable at will of either party. A discharge of such an employe does not constitute a breach of the contract. The employe may not be awarded damages on account of such a discharge.

As stated by the Washington Supreme Court in *Heideman v. Tall's Travel Shops, Inc.*, 192 Wash. 513, 516, 518; 73 P.(2d) 1323:

> "But if it be assumed that there was otherwise evidence enough to submit the question of decedent's life employment to the jury, the agreement would be unenforceable for want of any consideration moving to the appellant to support it other than the rendition of service by the decedent.
>
> "In *Minter v. Toole, Campbell Dry Goods Co.*, 187 Mo. App. 16, 173 S.W. 4, the plaintiff was employed by the defendant for a term which he supposed to be permanent. Discharged some two years thereafter, he brought an action to recover unpaid salary. In order to enter into the defend-

ant's employ, the plaintiff gave up another employment. The court said:

" 'The reported cases which deal with contracts of employment in commercial business, where no other consideration than a promise to perform the service passes from the employee to the employer, are almost unanimous in applying the general rule that the words permanent, lasting, constant, or steady, applied to the term of employment do not constitute a contract of employment for life, or for any definite period, and such contracts fall under the rule "that an indefinite hiring at so much per day, or per month, or per year, is a hiring at will and may be terminated by either party at any time, and no action can be sustained in such case for a wrongful discharge." * * *

" 'The general rule that the assurance of permanent employment will be construed as meaning an indefinte, as distinguished from a special, or merely temporary employment, is a common sense inference founded upon common knowledge of the customs and usages of business. The effort of plaintiff to show an additional consideration passing from him to defendant was abortive since it shows that he merely abandoned other activities and interests to enter into the service of defendant—a thing almost every desirable servant does upon entering a new service, but which, of course, cannot be regarded as constituting any additional consideration to the master.'

* * * * * * * *

(Page 518)—"The case of *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 57 Am. St. 488, 35 L.R.A. 512, is sometimes cited in support of the

view that the rendition of service coupled with the giving up of another employment, constitutes a consideration for permanent or life employment. But in that case the plaintiff was a competitor of the defendant and gave up a business and sold his stock in trade to the defendant, who agreed, in turn, to give the plaintiff permanent employment at a stated salary; the defendant thereby getting rid of his competition in business. As said in *Skagerberg v. Bladin Paper Co.*, 197 Minn. 291, 266 N.W. 872, 'The resulting situation amounted to the same thing in substance and effect as if plaintiff had purchased his job'."

This rule is also recognized and followed in *Gensman v. West Coast Power Co.*, 3 Wn.(2d) 404, 412, 101 P.(2d) 316, wherein the court stated:

"On the issue of respondent's life employment, we are clear that the court's finding should be sustained. Accepting the respondent's evidence at face value, the assurance given by Watson meant no more than that there would be a steady job for him so long as conditions were mutually satisfactory and there was work for him to do. *Heideman v. Tall's Travel Shops*, 192 Wash. 513, 73 P.(2d) 1323."

"In the annotation to *Rape v. Mobile & O. R. Co.*, 136 Miss. 38, 100 So. 585, found in 35 A.L.R. 1422, 1432, it is said:

" 'In most of the jurisdictions passing on the duration of a contract purporting to be for permanent employment, it is held that, in the absence of additional express or implied stipulation as to the duration of the employment or of a good consideration additional to the services contracted to be rendered, a contract for permanent

employment, for life employment, for as long as the employee chooses, or for other terms purporting permanent employment, is no more than an indefinite general hiring terminable at the will of either party'."

See also:

Heaman v. Rowell Co., 261 N.Y. 229, 185 N.E. 83 (For facts see 258 N.Y.S. 138);

Foster v. Atlas Life Ins. Co. (Okla.) 6 P. (2d) 805.

Here, as affirmatively shown by the allegations in the amended complaint, and by plaintiff's exhibits, there was in fact no consideration passing from plaintiff to defendant other than the services to be performed by plaintiff. Plaintiff's claim that in 1908 he "gave up his banking position" is not enough. Nor is plaintiff's claim that he rendered continuous service enough. Obviously, under the facts here the continuity of plaintiff's employment was not an additional consideration passing from him to the company.

Moreover, here it affirmatively appears that there was no contract for permanent employment or life employment, as before pointed out. The contract of employment provided specifically that it was terminable at the will of either of the parties.

Here it conclusively appears that there was no express or implied stipulation that plaintiff was to be employed permanetly, or for life, or as long "as he remained a Nylic." The stipulation was specifically to the contrary. Nor was there any consideration in addition to the services to be performed.

VII.

Alleged Contracts for Life Employment Are So Unusual that the Burden Is Upon the Person Claiming Under Such a Contract to Allege and Prove Clearly and Unmistakably Explicit Authority in the Representatives of the Alleged Corporate Employer to Make Such a Contract in its Behalf.

There is no allegation in the First Amended Complaint and no charge in the Bill of Particulars that the alleged life employment contract asserted by plaintiff was authorized by defendant's board of directors or by an officer having specific authority from the board of directors to do so, or that defendant had power to make such a contract.

In paragraph V. of the First Cause of Action plaintiff alleges that the oral representations upon which he relies were made by "agents of defendant corporation." In the Bill of Particulars (R. 120) plaintiff identifies these agents.

Name	*Position*
L. Seton Lindsay	Agency Director
Gilbert A. Smith	Inspector of Agencies
E. R. Perkins	Vice-president
Thomas A. Buckner	Vice-president
Robert E. Dedell	Secretary of Clubs

In paragraph III of the Third Cause of Action plaintiff refers to "express and implied promises and representations made by defendant and its agents to plaintiff." In the Bill of Particulars (R. 121-123) plaintiff identifies the "defendant's agents alleged by

plaintiff to have made promises and representations which defendant violated and the positions of such agents" as follows:

Name	*Position*
L. Seton Lindsay	Agency Director, Superintendent of Agencies and Vice-president
Gilbert A. Smith	Inspector of Agencies
E. R. Perkins	Vice-president
Thomas A. Buckner	Vice-president
Robert D. Dedell	Secretary of Clubs and Field Secretary
A. S. Elford	Agency Director and Inspector of Agencies
Walker Buckner	Vice-president
James M. Hudnut	Assistant Secretary
Robert E. Whitney	Inspector of Agencies
C. A. Lewis	Contract Registrar
E. E. Andrews	Agents Councilor

There is no allegation or charge in the First Amended Complaint or in the Bill of Particulars that the board of directors of the defendant corporation ever authorized or ratified a contract for life employment of plaintiff, or that it had authority to do so.

Consequently, it appears that apart from all other considerations plaintiff would fail to establish a cause of action even though he proved all the facts alleged. He would establish only an unauthorized contract of hiring, if any, not enforceable against the corporation, for the reasons set forth in the leading case of *Heaman v. E. N. Rowell Co., Inc.*, 261 N.Y. 229, 185 N.E. 83, in which the court states as follows:

"The action is one to recover damages for an alleged wrongful discharge of plaintiff from the employ of defendant.

"The question is whether an allegation in the complaint that an oral contract of employment for life by a corporation was made through its president, can be upheld as sufficient in law. That a contract for employment for life if authorized by the corporation and based on an adequate consideration, will ordinarily be sustained admits of no dispute. *Riefkin v. E. I. DuPont de Nemours & Co.*, 53 App. D.C. 311, 290 F. 286; *Arentz v. Morse Dry Dock & Repair Co.*, 249 N.Y. 439, 444, 164 N.E. 342, 62 A.L.R. 231. Alleged contracts of life employment are, however, so unusual as to have been, with rare exceptions, condemned by the courts as unreasonable and unauthorized. The president or other executive officer of a corporation has no authority as such to make a contract that one should remain in the corporate employ for life even under a general power 'to appoint, remove and fix the compensation of employees.' That any board of directors or other persons responsible for the management of a corporation should give such unusual power to an executive officer cannot be implied. Plain language of the managing board, clearly showing that such was the intention of the corporation, coupled with power actually or impliedly vested in the corporation itself, must be found to justify such a hiring. *Carney v. New York Life Ins. Co.*, 19 App. Div. 160, 161, 45 N.Y.S. 1103, affirmed, 162 N.Y. 453, 57 N.E. 78, 49 L.R.A. 471, 76 Am. St. Rep. 347; *Alexander v. Equitable Life Assur. Soc.*, 233

N.Y. 300, 135 N.E. 509; *Clifford v. Firemen's Mut. Benefit Ass'n. of City of New York*, 232 App. Div. 260, 249 N.Y.S. 713, affirmed 259 N.Y. 547, 182 N.E. 175; *Davidson v. Library Bureau*, 234 App. Div. 47, 254 N.Y.S. 95, modified 259 N.Y. 654, 182 N.E. 221.

"The complaint does not suggest that the board of trustees of the defendant corporation ever authorized or ratified the contract set forth in the complaint. Plaintiff rests entirely on the affirmative allegation that the contract was made 'through the president.' If the plaintiff proved the facts alleged and nothing more he would fail to establish a cause of action. He would establish an unauthorized contract of hiring, not enforceable against the corporation."

See also:

Seiss v. McClintic-Marshall Corp., 188 Atl. 109;

Beaton v. Continental Southland S. & L. Association, 101 S.W.(2d) 905;

Heideman v. Tall's Travel Shops, Inc., 192 Wash. 513, 73 P.(2d) 1323;

Foster v. Atlas Life Ins. Co. (Okla.) 6 P. (2d) 805.

VIII.

The Allegations in the Third Cause of Action Do Not State a Claim Upon which the Court May Enter a Judgment Reforming the Agency Agreement (Exhibit "D") or Grant Plaintiff any other Equitable Relief.

In the Third Cause of Action plaintiff seeks to obtain a reformation of the agency agreement, Ex-

hibit "D", by striking from Section 20th of the agreement the words "either party hereto may without cause terminate this agreement upon thirty days written notice" and then seeks to recover $485,864.42 as damages on account of an alleged breach of the agreement as reformed.

It is the position of the defendant that the allegations in the Third Cause of Action are not sufficient to sustain a decree for reformation or a judgment for damages as prayed.

There is no allegation of fraud, bad faith or inequitable conduct in respect of the execution of the agency agreement dated December 31, 1927, which is in fact the only agency agreement involved in this litigation, or in respect of the execution of the prior agency agreement dated August 17, 1910, or in respect of Nylic 2.

The only allegation is a conclusion of the pleader that the provision in the written agency agreement dated December 31, 1927, granting either party the right to terminate the agreement upon thirty days written notice is "contrary and repugnant to the express and implied intentions of the contracting parties" and "is so oppressive to plaintiff that it is against public policy."

There is no allegation of mutual mistake. As stated in *John Hancock Mutual Life Ins. Co. v. Agnew*, 1 Wn.(2d) 165, 176, 95 P.(2d) 386:

> "When no question of fraud, bad faith or inequitable conduct is involved, and the right to

reform an instrument is based solely on a mistake, it is necessary that the mistake be mutual and that both parties understood the contract as the complaint or petition alleges that it ought to have been and as in fact it was except for the mistake. * * *

"Where any doubt exists as to the intent of the parties, reformation will not be granted. * * *"

There is no allegation that the written words in the agency agreement contain the real intention of neither of the parties. As stated by the court in *Anderson v. Freeman*, 88 Wash. 608, 153 Pac. 307:

"Those who seek to reform an instrument on account of mutual mistake must do so by language clear and convincing besides showing that the written words contain the real intention of *neither* of the parties. *Moore v. Parker*, 83 Wash. 399, 145 Pac. 440. Where there is no fraud, and one party believes that he is getting by the document what he for his part intended to get, the thing cannot be undone by the other. * * *"

Having signed and accepted the written agency agreement of December 31, 1927, and having obtained the benefits thereof and having served thereunder as an agent of the defendant for eight and one-half years, plaintiff may not now claim to have been misled concerning its contents or to be ignorant of what was specifically provided therein. As stated by the court in *Kelley v. von Herberg*, 184 Wash. 165, 50 P.(2d) 23:

"We have always held that a party whose

rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein."

IX.

Neither as a Matter of Fact Nor as a Matter of Law Was there any Fiduciary Relationship Between Defendant and Plaintiff, as Asserted by Plaintiff.

Petitioner's alleged Third Cause of Action does not come within any exception to the foregoing rules.

Plaintiff argued in the District Court that "where a fiduciary or confidential relationship exists there is no necessity to allege fraud, deception, duress, disability, mistake or undue influence." None of the authorities cited by plaintiff indicated that any court has ever held that the relationship between an insurance company and its soliciting agent, such as was the relationship between defendant and plaintiff, is in any respect a fidicuiary relationship. We submit that there is no authority at all for such an assertion.

Nor is there any fact alleged or suggested in the instant case which warrants a belief that plaintiff "reposed" any confidence in defendant or that defendant exercised the slightest "domination" over plaintiff.

To the contrary, here it appears conclusively from the allegations of the Complaint, as supplemented by

the Bill of Particulars, that no fidicuary relationship which could be recognized as such by any court existed between plaintiff and defendant.

Plaintiff was an insurance agent, employed only as a soliciting agent. Obviously the relationship between plaintiff and defendant was nothing more than the normal and traditional relationship which exists between any principal and a soliciting agent in the life insurance business. There is no allegation that defendant ever acted or purported to act as an agent of plaintiff, or purported to represent or to act for or in behalf of plaintiff in any capacity. If any such charge were made, it could not be accepted as true. Plaintiff and defendant were dealing at arm's length and there is no allegation of fact to the contrary. Nor is there any charge that petitioner was under a disability which imposed some unusual duty upon defendant to protect plaintiff. Nor is there any allegation of fact which could possibly indicate the existence of a relationship between plaintiff and defendant which impelled or induced plaintiff to relax the care and vigilance which he otherwise should and ordinarily would exercise. The relationship was only a normal and traditional business relationship.

On principle, it is submitted, the position of defendant is sound. It is also sustained by the authorities.

In *Collins v. Nelson*, 193 Wash. 334, 345, 75 P. (2d) 570, the action was brought to recover for the loss of money paid by plaintiff on two promissory

notes which were given in the purchase of certain mining stock which was placed in escrow with the defendant. The facts, as in most such circumstances, are extremely complicated. For present purposes it is enough to say that the plaintiff had had some further business transactions with the defendant; that there was testimony of a conversation between the parties in which defendant guaranteed to see that the stock was put up in escrow, and that in paying the notes plaintiff relied upon defendant's promise, and believed that the stock had been placed in escrow with the defendant as escrowee; that a copy of the escrow agreement, naming defendant as escrowee, was forwarded to the defendant; and that at the time of the payment of the notes defendant knew that the stock had not been placed in escrow as agreed.

Plaintiff contended that the action was for fraud and deceit. The theory was that a confidential relation existed between plaintiff and defendant, and that it was the duty of defendant, at the time plaintiff paid the notes, to inform plaintiff that the stock was not in defendant's possession, nor ready for delivery. In holding that no confidential relation existed, the court said:

> "The court did not find, nor are we able to discover from the evidence, that there was any confidential relation existing between Nelson and Collins. It is true that there had been some social contact and friendly relations, as well as one prior business transaction between them, but

there was no relation which, in law, could be said to be confidential. The social relations were casual, and the prior business deal involving the sale by the one and the purchase by the other of certain stock had been conducted at arm's length.

"To establish a fiduciary relationship upon the violation of which fraud is sought to be based, there must be something more than mere friendly relations or confidence in another's honesty and integrity. *There must be something in the particular circumstances which approximates a business agency, a professional relationship, or a family tie, something which itself impels or induces the trusting party to relax the care and vigilance which he otherwise should, and ordinarily would exercise.*" (Italics supplied.)

In *Cranwell v. Oglesby*, 12 N.E.(2d) 81, the Supreme Judicial Court of Massachusetts, quoting from one of its earlier decisions, states the fundamental requirement to be as follows:

" 'Mere respect for the judgment of another or trust in his character is not enough to constitute such a relation. There must be such circumstances as indicate a just foundation for a belief that in giving advice or presenting arguments one is acting not in his own behalf, but in the interests of the other party. If the relation is a business one, the existence of the mutual respect and confidence does not make it fiduciary'."

In *Van Dale v. Prudential Ins. Co. of America* (Wis. 1937) 274 N.W. 153, the action was initiated by the plaintiff to recover disability benefits under

four life insurance policies which had been issued to him by the defendant, notwithstanding the fact that plaintiff had theretofore, in consideration of the payment to him of the sum of $5,110.20 (disability payments for eighteen months), surrendered two of the policies for cancellation, and the other two policies for reissue with the disability clauses eliminated therefrom. The plaintiff alleged that the surrender of the policies was induced by fraudulent representations upon which he relied.

It appeared that plaintiff had also been a soliciting agent for the defendant company for some years, as a result of which it was contended that a confidential or fiduciary relationship existed between the plaintiff and the defendant. On this point the court said:

> "The trial court was of the opinion that a confidential or fiduciary relationship existed between the plaintiff and the defendant. We see no warrant for such a conclusion. True, the plaintiff had been in the employ of the defendant for a number of years, had been a valued employee, had enjoyed and received the approbation of his employer, and rightly had faith and confidence in the defendant company, but those facts did not create a fiduciary relationship, * * *."

Under the allegations relied upon by Petitioner and the foregoing authorities it is submitted that it conclusively appears that there was no fiduciary relationship between Petitioner and Respondent.

X.

If the Agreement Relied Upon by Plaintiff Be Considered and Construed (Contrary to the Facts) as a Separate Contemporaneous Oral Agreement, it would be Void under the Statute of Frauds.

It appears conclusively that the representations relied upon by plaintiff as alleged and as set forth in the bill of particulars were oral. It is charged that they were made and relied upon by plaintiff prior to plaintiff's application for membership in Nylic (August 17, 1910). The representations as alleged and set forth in the bill of particulars are that if "a Nylic system" were reinstated by defendant "plaintiff would have an opportunity to qualify for a life career in the insurance business with defendant, *provided plaintiff could survive the requirements of defendant for the first 20 years during which period an agent could be discharged with or without cause.*" (Paragraph VI First Cause of Action, R. 28-29, bill of particulars, R. 119). (Italics supplied.)

Obviously the alleged agreement could not possibly have been performed prior to December 31, 1927, which is more than 17 years after it is claimed by plaintiff that the alleged representations were made.

It follows that if the agreement relied upon by plaintiff be considered and construed to be a separate contemporaneous oral agreement, which it was not, it would be void under the statute of frauds because it conclusively appears that it could not have been

performed under any circumstances within one year from the making thereof. Such an agreement is void.

Rem. Rev. Stat. of Washington, Sec. 5825;
Fredenburg v. Fredenburg, 288 N.Y.S. 377;
Union Savings & Trust Co. v. Krumm, 88 Wash. 20, 152 Pac. 681;
Hendry v. Bird, 135 Wash. 174, 237 Pac. 317;
Brock v. Button, 187 Wash. 27, 59 P.(2d) 761.

The recognized rule is that when the bar of the action by the statute of frauds appears "on the face of the pleading," the question may be raised on a motion to dismiss for insufficiency under Rule 12(b).

In *Kahn v. Cecelia Co.* (District Court, S.D. New York) 40 F. Supp. 878, 879, the rule is stated:

> "Just prior to the argument of the motion, the parties, by written stipulation, limited its scope to a single question, namely, whether the first cause of action should be dismissed 'on the ground that said first cause of action is barred by the Statute of Frauds.'
>
> "Under Rule 8(c) of the Federal Rules, 28 U.S.C.A. following section 723c, the Statute of Frauds is an affirmative defense to be pleaded, *Piest v. Tide Water Oil Co.*, D.C., 27 F. Supp. 1020, but where the defect appears on the face of the pleading the question may be raised on motion to dismiss for insufficiency under Rule 12(b), Moore's Federal Practice, § 12.04, pp. 644-647."

Before closing this part of the brief it is believed

appropriate to point out that normally there is some reason for every termination of an agency agreement and that in many cases there may be reasons for a termination not susceptible of proof to the satisfaction of a jury. Consequently, it is not unreasonable or unusual for an employer to protect himself against an undesirable agent by a provision permitting a termination of the agreement at will, upon notice, so as to avoid making a jury the sole judge of the competency or loyalty or integrity of the agent.

In the instant case the right to terminate the agreement was mutual. Plaintiff could have resigned at will and deprived defendant of his services after years of training.

It is respectfully submitted that it conclusively appears from the allegations in the First Amended Complaint, and the exhibits and Bill of Particulars which are a part thereof, (1) that defendant had the right to terminate plaintiff's employment, as specifically provided in the agency agreement of December 31, 1927; (2) that there was no breach by defendant of the agency agreement or Nylic 2 or any other agreement, and no violation by defendant of any duty owed by it to plaintiff; (3) that the Third Cause of Action does not state a claim under which the court could enter a decree reforming the agency agreement (Exhibit "Б") or grant plaintiff any other equitable relief as prayed; (4) that the allegations in the Third Cause of Action do not state a claim under which the court could enter judgment

in favor of the plaintiff in any sum for damages claimed to have been suffered by reason of the termination of plaintiff's employment, and (5) that the judgment of dismissal entered by the District Court was right and correctly affirmed by the Circuit Court of Appeals.